state court should be given a prospective, but not a retroactive effect.[15] Since, however, this theory amounts virtually to the recognition of the legislative nature of a judicial decision, it is difficult to see how the result can be reconciled with *Swift* v. *Tyson,* which was based squarely on the theory that judicial decisions are effective merely as evidence of the law. Whatever views may be held as to the soundness of its principle, it must be recognized that *Gelpcke* v. *Dubuque* has likewise been uniformly followed, and is to-day a well established rule.

The third important exception lies in cases wherein the law of the state was not judicially determined at the time the rights in litigation accrued.[16] Thus, if the state adjudication was merely after the rights accrued,[17] or if it had taken place after a contrary decision of the federal court,[18] or even if, in certain cases, there has been only a single decision on the point,[19] it is held that there was no law of the state which was necessarily to be applied by the federal courts. Although this rule is obviously one of a practical nature, it is certainly open to logical attack,[20] and in a few instances has been disregarded by the Supreme Court.[21] In a recent case in the Supreme Court, *Kuhn* v. *Fairmont Coal Co.* (1909) 30 Sup. Ct. Rep. 140, the question was presented anew. The district court had considered itself bound to apply the law of mining conveyances announced by the Supreme Court of West Virginia after the rights in the principal case accrued. The Supreme Court reversed this holding, and held that the district court should exercise its independent judgment on the rights of the parties under the conveyance. Although this decision is a logical holding in the light of the doctrine of *Burgess* v. *Seligman supra,* it is unfortunate as leading to the application of two different rules of property in the same jurisdiction. Since, however, the reason for the application of this independent rule would not be present in suits arising subsequent to the state decision, it is probable that the federal courts would follow the state rule in later cases, and hence, except in the principal case, the divergence is of slight practical importance.

ENFORCEMENT IN EQUITY OF CONDITIONS PRECEDENT TO THE EXERCISE OF THE RIGHT OF EMINENT DOMAIN.—The organic law of practically every American jurisdiction forbids the taking of property for public use without just compensation, but there is no uniformity in the decisions as to the scope of such provisions. Despite an earlier view, which—based on a literal construction—required com-

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[15]Ohio Life Ins. & Trust Co. *v.* Debolt (1853) 16 How. 416; Douglass *v.* County of Pike (1879) 101 U. S. 677.

[16]Burgess *v.* Seligman (1882) 107 U. S. 20.

[17]East Alabama Ry. Co. *v.* Doe (1884) 114 U. S. 340.

[18]Gt. Southern Hotel Co. *v.* Jones (1903) 193 U. S. 532.

[19]Barber *v.* Pittsburg etc. Ry. (1896) 166 U. S. 83; Stanley Co. *v.* Coler (1903) 190 U. S. 437.

[20]See opinion of Holmes J., dissenting, in Muhlker *v.* Harlem R. R. Co. (1904) 197 U. S. 544.

[21]Bauserman *v.* Blunt (1893) 147 U. S. 647; Balkam *v.* Woodstock Iron Co. (1893) 154 U. S. 177.

pensation only in cases of exclusive appropriation,[1] there now prevails a more liberal rule, founded on the basic conception that property consists not merely in tangible things, but also in the concomitant rights of enjoyment. The logical conclusion therefrom, that any act impairing or destroying a private right, that is, any injury to property actionable at common law, is a taking, is urged by eminent authority[2] and is apparently approached by at least one jurisdiction,[3] but actual decision has stopped short of this result. Certainly, under the liberal rule, any act involving a physical invasion of property, direct or indirect,[4] the disturbance of an easement incident to real property,[5] or the imposition of a new or additional burden thereon,[6] constitutes a taking of property. Where, however, the authorized act involves merely the maintenance of a private nuisance, there seems to be no settled rule. Theoretically such impairment of private rights constitutes a taking, and this view, although the decisions are conflicting,[7] is sanctioned by strong judicial opinion.[8] This confusion is avoided where, as in many states, the constitution requires compensation for property damaged as well as taken.[9] In that case, clearly, the liability becomes co-extensive with that of the individual at common law.[10] This, too, seems a proper maximum,[11] but some jurisdictions include under such constitutional provisions all damage in fact.[12]

To restrain unauthorized injury to property under color of the right of eminent domain, equity frequently lends its aid, and bases its jurisdiction on the usual grounds governing its action in cases of trespass and nuisance. Obviously, when the damage, though actionable, is slight or remote, this jurisdiction wholly fails. But where the exercise of the right to "take" is, by the constitution expressly forbidden except upon the performance of certain conditions precedent, as prepayment of compensation, such conditions are strictly

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[1]Cushman *v.* Smith (1852) 34 Me. 247; Livermore *v.* Jamaica (1851) 23 Vt. 362.

[2]Lewis, Eminent Domain (3rd ed.) § 55 *et seq.*

[3]Eaton *v.* B. C. & M. R. R. (1872) 51 N. H. 504; Thompson *v.* Androscoggin River Imp. Co. (1874) 54 N. H. 545.

[4]Pumbelly *v.* Green Bay Co. (1871) 13 Wall. 166.

[5]Story *v.* R. R. (1882) 90 N. Y. 122; De Geofroy *v.* Merchants' Bridge T. R. Co. (1903) 179 Mo. 698.

[6]Donovan *v.* Allert (1902) 11 N. D. 289; Williams *v.* N. Y. C. R. R. (1857) 16 N. Y. 97.

[7]Beseman *v.* Penn. R. R. (1888) 50 N. J. L. 235; Bellinger *v.* N. Y. C. (1861) 23 N. Y. 42; Penn. R. R. Co. *v.* Angel (1886) 41 N. J. Eq. 316; Blanc *v.* Murray (1884) 36 La. Ann. 162.

[8]See Balto. & Pot. R. R. Co. *v.* Fifth Baptist Church (1882) 108 U. S. 317; Louisville & M. Term. Co. *v.* Lellyett (Tenn. 1905) 1 L. R. A. (N. S.) 49, and note.

[9]See const. provisions of Ala., Ark., Cal., Ga., Ill., Ky., La., Miss., Mo., Mont., Neb., N. D., Pa., S. D., Tex., Utah, Wash., W. Va. and Wyo.

[10]Chicago *v.* Taylor (1887) 125 U. S. 161; Gainesville *v.* Hall (1890) 78 Tex. 169; Lake Erie & W. R. R. Co. *v.* Scott (1890) 132 Ill. 429.

[11]C. W. I. R. R. Co. *v.* Cogwell (1892) 44 Ill. App. 388; M. R. R. *v.* Goll (1902) 100 Ill. App. 328.

[12]Mason City & F. D. R. Co. *v.* Wolf (Neb. 1906) 148 Fed. 961; City Council of Montgomery *v.* Maddox (1889) 89 Ala. 181.

enforced without an inquiry into general equities.[13] Here the jurisdiction rests on a special ground: the necessity, because of the unequal position of the private landowner, of restraining those clothed with extensive powers easily capable of abuse, within the precise limits of their authority.[14] It follows irresistibly that where, as in several states, the right to "damage" is likewise conditioned,[15] the assumption of equitable jurisdiction in all cases of damage actionable by reason of such provisions, is equally mandatory.[16] "The constitution is the final law, measuring all public and private rights, whose commands legislatures and courts must respect; whose mandates, when imperative, must be enforced regardless of all consequences. As the established rule of construction has been, under constitutions prohibiting the taking of private property for public use until compensation was first made, to enforce that mandate irrespective of all legislative action, the same result must obtain in this case. The damage to property is placed upon the same basis as the value of property taken, and neither can be done without compensation first made. In other words, uniting 'property damaged' with 'property taken' in the same clause and subject to the same prohibitions places them in the same category as to judicial action."[17]

In a recent case, *Hyde* v. *Minn. D. & P. Ry. Co.* (S. D. 1909) 123 N. W. 849, where the injury was indirect and resulted from operations on land previously acquired by the defendant, the court escaped this result, by holding that its chancery jurisdiction was not enlarged or changed by the constitutional provisions in question, but was, in this case as in all others, limited to the general grounds of equitable action as set forth in the civil code of the state, in which event obviously the necessary grounds of equitable jurisdiction were lacking. This position, besides being a clear departure from the general practice of courts of equity even in the same state,[18] obviously renders nugatory a mandatory provision of the constitution. It is doubtful, morever, if any decision sustains the position thus taken, the cases cited by the court being distinguishable as decided under substantially different constitutional provisions,[19] while a few others

[13]Searle *v.* Lead (1898) 10 S. D. 312; Birmingham Traction Co. *v.* B. R. & E. Co. (1898) 119 Ala. 129.

[14]McElroy *v.* Kansas City (1884) 21 Fed. 257; East etc. R. R. Co. *v.* E. T. R. Co. (1883) 75 Ala. 275, 280; Lewis, Eminent Domain (3rd ed.) § 632; Kerr, Injunctions 188; 6 Thompson Corporations, §§ 7772, 7773.

[15]See const. provisions of Ala., Cal., Ga., La., Miss., N. D., Pa., S. D., Wash.

[16]McElroy *v.* Kansas City *supra;* Brown *v.* Seattle (1892) 5 Wash. 35; City Council of Montgomery *v.* Lemle (1898) 121 Ala. 609.

[17]Brewer J., in McElroy *v.* Kansas City *supra,* at 259.

[18]See Searle *v.* Lead *supra.*

[19]Penn. Mutual Life Ins. Co. *v.* Heiss (1892) 141 Ill. 35. The Illinois cases were relied on by the court. Neither the constitution of that state nor the eminent domain statute of 1872 clearly makes payment a condition precedent to the right to damage. Hutton *v.* London & S. W. R. W. Co. (1899) 7 Hare 259 (no express condition precedent). For a decision in the same jurisdiction under a provision like that in the principal case, see Corporation of Parkdale *v.* West (1887) L. R. 12 App. Cas. 602. The constitutions of West Virginia, Texas, and Kentucky effect the result reached in the principal case by making payment a condition to taking but not to damaging. See Spencer *v.* R. R. (1884) 23 W. Va. 406.

not cited but more nearly in point rest on special grounds inapplicable to the principal case.[20] The only case found, *Moore* v. *City of Atlanta* (1883) 70 Ga. 611, in which, where remote injury was actionable and prepayment for damage was clearly required, injunctive relief was denied, is weakened as authority because the decision was based on the balance of convenience. Further, the constitution in South Dakota plainly prescribes one rule for all property injured for public purposes, and implies no such distinction as is introduced by the court between actionable injury caused by acts on land already acquired, and such as results immediately from a taking of property.

EFFECT OF A LESSOR'S CONDUCT ON BREACHED CONDITIONS PRECEDENT TO THE LESSEE'S RIGHT OF RENEWAL.—Equity is slow to relieve a plaintiff who is in default,[1] for the position of one seeking to compel another to perform, when himself guilty of non-performance, although not unconscionable so as to call into play the doctrine of unclean hands, may perhaps be reprehensible, for he who seeks equity must do equity.[2] In the one case, in theory at least, the court, applying the doctrine of its own motion,[3] closes its doors upon the plaintiff *in limine*;[4] in the other the plaintiff has a standing in court and may be granted relief, provided he "does equity."[5] But non-performance of a condition precedent is regarded as a default of such a character as to bar relief by specific performance.[6] Under what circumstances then will relief be given in the case of a lessee demanding specific performance of a covenant to renew, where he himself has been guilty of a breach of covenant? It is well settled that such relief will be given under proper circumstances,[7] and the lessee's right may not be lost by the breach of an independent covenant.[8] But where a power of reentry is attached, the covenant acquires the force of a condition[9] and so a breach working forfeiture would cause a loss of that right, since the forfeiture of the term has that effect.[10] Where a lessee's right of renewal however is made expressly conditional on the performance of the covenants in the lease, such performance becomes a condition pre-

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[20]Delaware Co.'s Appeal (1888) 119 Pa. St. 159 (no method provided for assessing compensation on application of condemnor); McMahon & Perrin *v.* R. R. Co. (1889) 41 La. Ann. 827 (no actionable damage at law or in equity).

[1]Fry, Specific Performance (4th ed.) § 922; Story, Eq. Jur. § 771.

[2]Pomeroy, Eq. Jur. §§ 385-8.

[3]8 COLUMBIA LAW REVIEW 40.

[4]Pomeroy, Eq. Jur. § 397. For a discussion of the circumstances under which relief may be granted where the defendant is in greater guilt, see 7 COLUMBIA LAW REVIEW 416.

[5]Pomeroy, Eq. Jur. § 386.

[6]Haines *v.* Barber (N. Y. 1906) 113 App. Div. 696; Williams *v.* Brisco (1882) L. R. 22 Ch. D. 441.

[7]N. Y. Life etc. Co. *v.* Rector etc. (N. Y. 1883) 12 Abb. N. C. 50.

[8]Lyons *v.* Osborn (1891) 45 Kan. 650; Trant *v.* Dwyer (1828) 1 Dow & Cl. 125.

[9]Kew *v.* Trainer (1894) 150 Ill. 150.

[10]Job *v.* Banister (1856) 3 Jur. (N. S.) 93.